IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.913 OF 2005
IN
EXECUTION APPLICATION (L) NO.274 OF 2005
IN
SUMMARY SUIT NO.5853 OF 1998

M/s.Gwalior Oil Mills ..Plaintiffs.

Vs.

M/s.Geekay Exim (India) Ltd. ..Defendants.

And

Oriental Bank of Commerce ..Applicants.

Mr.Shekhar Shetye i/b.M/s.B.Amin & Co. for the Plaintiffs.

Mr.Simil Purohit with Ms.Priya Dwarkadas with Mr.R. Aditya Narayan i/b.M/s.Wadia Gandhy & Co. for the Applicant.

CORAM : S.J. VAZIFDAR, J.
DATED : 24TH JANUARY, 2006

P.C. :

This is the Plaintiff's Chamber Summons seeking an order attaching/continuing a deposit of Rs.8,00,000/- made by the Applicant, Oriental Bank of Commerce Ltd. for being paid over to the Plaintiff towards satisfaction of a decree dated 3.4.2001 passed in its favour in the above suit. The deposit was made pursuant to an order dated 2.5.2002 in Notice of Motion No.1294 of 2002 taken

out by the Applicant in the above suit. The Plaintiff has also prayed for an order restraining the Applicant from withdrawing the said amount of Rs.8,00,000/-.

2. It is necessary before dealing with the rival contentions on merits, to refer to the facts leading to the present Chamber Summons.

3. The Plaintiff is the judgment creditor and the Defendant is the judgment debtor. The Plaintiff obtained a decree dated 3.4.2001 in the sum of Rs.7,67,232.40 with interest on the principal sum of Rs.4,85,550 at the rate of 15% per annum from the date of the decree till payment and for costs quantified at Rs.29,662.

4. The Plaintiff took out Notice of Motion No.1095 of 2002. For reasons to follow, the fate of the present Notice of Motion depends substantially upon the tenability of Notice of Motion No.1095 of 2002. Prayer (a) of Notice of Motion No.1095 of 2002 reads as under :

> "(a) that the Defendants by themselves, their servants and agents be restrained by a

> permanent order and injunction of this Hon'ble Court from in any manner dealing with and/or disposing off and/or parting with possession of and/or creating any third party interest of whatsoever nature in respect of the Defendants' property situated facing L.B.S. Marg on Agra Road, Nahur, in Bombay Suburban, admeasuring 7113.72 sq. mtrs. bearing Survey No.92, Hissa No.1, Survey Nos.93 and 162 and more particularly described in the Schedule annexed hereto;"

An ad-interim order dated 19.4.2002 was passed restraining the Defendant from dealing with, disposing of or parting with possession of certain immoveable property owned by it and from creating any third party interest of any nature whatsoever in respect thereof.

5. The Applicant took out Notice of Motion No.1294 of 2002 seeking the setting aside/modification of the order dated 19.4.2002. An order dated 2.5.2002 in this Notice of Motion, recorded the statement of the Counsel that the Applicant was ready to deposit an amount of Rs.8,00,000/- in Court. It was further submitted on behalf of the Applicant that if the Plaintiff succeeded in Notice of Motion No.1095 of 2002 it may have its claim satisfied out of the said

deposit. An ad-interim order in terms of prayer (b) was granted whereby, the order dated 19.4.2002 was set aside/modified/clarified to provide that the same cannot prohibit the Applicants from exercising their rights as mortgagees of the property in question and that their right under the agreement for sale referred to in the affidavit in support thereof, including their right to have the agreement performed was unfettered by the Plaintiff's claim.

6. Notice of Motion Nos.1095 of 2002 and 1294 of 2002 were disposed of by an order dated 30.6.2005. The order records the Applicant's submissions, which I shall refer to later, while dealing with the rival contentions on merits. The order recorded the concession made by the counsel for the Plaintiff that Notice of Motion No.1095 of 2002 was not the appropriate remedy for executing and/or enforcing the decree. Liberty was sought to take out appropriate proceedings and, in the light thereof, Notice of Motion No.1095 of 2002 was not pressed. Notice of Motion No.1095 of 2002 was accordingly disposed of reserving to the Plaintiff, liberty to adopt appropriate proceedings for execution and keeping the contentions of both sides open.

By the said order, the amount of Rs.8,00,000/- deposited pursuant to the order dated 2.5.2002 was ordered to remain deposited for a period of two weeks to enable the Plaintiff to adopt appropriate proceedings.

It is necessary to note that the learned Judge did not deal with the submissions on behalf of the Applicant to the effect that the Plaintiff was not entitled to the said amount as the decree obtained by it being one for money, cannot rank higher than the Applicant's claim. It was contended on behalf of the Applicant that the issue as to whether the Plaintiff was at all entitled to seek relief sought for in the Notice of Motion, ought to be examined. The learned Judge however kept this question open.

7. The Plaintiff thereafter took out Notice of Motion No.1957 of 2005 for reliefs, the nature of which are similar to the reliefs claimed in the present Chamber Summons. By an order dated 14.7.2005 the Plaintiff was permitted to withdraw the said Notice of Motion with liberty to take out appropriate proceedings. The deposit of Rs.8,00,000/- was directed to be continued till 20.7.2005. It is obvious that the Notice of Motion

was withdrawn in view of the objection to the effect that the appropriate application would be a Chamber Summons and not a Notice of Motion as the matter related to execution of a decree.

8. It is in these circumstances that the above Chamber Summons was taken out by the Plaintiff. By an ad-interim order dated 19.7.2005 in the above Chamber Summons, the Applicant was permitted to withdraw the amount of Rs.8,00,000/- on the condition that they would bring back the same alongwith interest as and when directed by this Court in the present Application. It was further provided that if the Applicants were not inclined to accept this condition they would not withdraw the said amount pending the hearing of the Chamber Summons.

9. By the order dated 2.5.2002 the Applicant had submitted that if the Plaintiff ultimately succeeded in Notice of Motion No.1095 of 2002 it may have its claim satisfied out of the said deposit. It is true that Notice of Motion No.1095 was withdrawn. However, the same was with liberty to adopt appropriate proceedings. It is also true that even thereafter, appropriate proceedings were not adopted

and, once again, a Notice of Motion being Notice of Motion No.1957 of 2005 was taken out. However, the same was also allowed to be withdrawn with leave to adopt appropriate proceedings by the order dated 14.7.2005. In the circumstances, the mere fact that Notice of Motion No.1905 of 2002 was withdrawn would not disentitle the Plaintiff from contending that it is entitled to the reliefs claimed therein. It must however be noted that the reliefs in Notice of Motion No.1905 of 2002 are different from the reliefs claimed in the present Notice of Motion, a fact which is of considerable importance.

10. The property in question admittedly belonged to the Defendant. There is no dispute regarding the decree obtained by the Plaintiff. Nor is there any dispute about the fact that ordinarily the Plaintiff would be entitled to have its decree satisfied by executing it, inter-alia, against the said property. The Applicant’s case is that the Plaintiff is not entitled to execute the decree against the said property in view of their rights in respect thereof.

11. The Applicant’s case is that the Defendant had guaranteed their dues of an aggregate sum of almost Rs.140 crores and that the said property at Mulund,

Mumbai, admeasuring 29,262.50 sq. mtrs. with commercial towers being built thereon, belonging to the Defendant was secured in the Applicant's favour for due repayment of the said amounts. The security was by way of an equitable mortgage evidenced by a memorandum dated 2.8.1995. The equitable mortgage, according to the Applicants, was created by way of security for the due repayment by the Defendant of the amounts guaranteed by it in respect of the facilities granted by the Applicants to the Defendant as well as to its various group companies. It is not necessary however to set out the details of the equitable mortgage, including the names of the principal debtors whose liabilities the Defendants had guaranteed and secured by the mortgage as, thereafter, a mortgage deed was executed.

12. A mortgage deed dated 26.3.2002 was executed by the Defendants and one Triad Constructions (P) Limited, therein referred to as the "first mortgagor" and the "second mortgagor" respectively, and the Applicant (then known as the "Global Trust Bank Ltd."), therein referred to as the "mortgagee". By the said deed, the Defendant purportedly mortgaged in favour of the Applicant only the land,

and Triad Constructions (P) Limited purportedly mortgaged in favour of the Applicant, two towers being built thereupon, consisting of lower ground floor, upper ground floor and six upper floors, admeasuring in the aggregate 7113.72 sq. mtrs. per building.

Clause 8(c) of the mortgage deed reads as under:

> "**8. CONSEQUENCES UPON HAPPENING OF ANY EVENT OF DEFAULT**
>
> On the happening of any of the Events of Default and in any of the said cases, notwithstanding anything herein contained to the contrary, the following consequences shall follow :-
>
> (a) .....
>
> (b) .....
>
> **(c) Power to sell**
>
> AND IT IS HEREBY AGREED AND DECLARED that it shall be lawful for the Mortgagee at any time or times hereafter without any further consent on the part of the Mortgagors, to sell the said mortgaged premises hereby granted, assigned, transferred and assured or expressed so to be or any part or parts thereof either together or in parcels; either by public auction or private contracts and either with or without special conditions or stipulations

relative to title or evidence of title or otherwise with power to postpone such sale from time to time and to buy the said mortgaged premises or any part thereof at any sale by public auction or to rescind or vary such contract for the sale thereof and to resell the same from time to time without being answerable for any loss or diminution in price occasioned thereby and for the purposes aforesaid or any of them to make agreements / transfers / conveyances, execute assurances, give effectual receipts, or discharges for the purchase money, and do all other acts and things for completing the sale which the person or persons exercising the power of sale shall think proper PROVIDED ALWAYS AND IT IS HEREBY FURTHER AGREED AND DECLARED that the power of sale hereinbefore contained shall not be exercised by the Mortgagee unless and until :-

a) Any of the Events of Default as provided above, has occurred; or

b) Default shall have been made in payment of the mortgage debt on or any part thereof by the Mortgagors and a notice has been given by the Mortgagee to the Mortgagors and the Mortgagors have failed to pay the mortgage debt for the space of three months next after a notice in writing as required under the clause (2) Section 69 of the Transfer of Property act, 1882 and requiring payment of the mortgage debt together with interest and charges, if any, as may for the time being be due shall have been served on the Mortgagors;"

The rest of the clause pertains to the manner in which the right of sale is to be exercised and the manner in which the sale is to be held. The same is not relevant for the purpose of this order.

13. The Plaintiff's contention, to which I shall advert shortly, is that the Defendant was the owner of the entire property including the land and the said buildings and that Triad was not the owner of the towers/buildings and was therefore not entitled to mortgage the same in favour of the Applicants.

14. According to the Applicants, thereafter, pursuant to correspondence and certain deeds executed by the parties, the said property including the land and structures thereon was agreed to be sold by the Defendant to the Applicants at and for the consideration to be paid by the Applicants by adjustment of its dues from various companies guaranteed by the Defendant and payment whereof was allegedly secured by the said mortgage deed. It would be convenient at this stage therefore to refer to these documents.

15. A letter dated 27.2.2002 was addressed by the Defendants to the Applicants. The letter contained a proposal for a one time settlement of the dues of various group companies. It is not necessary to refer to the letter in any detail for, ultimately, a letter dated 2.4.2002 addressed by the Applicants to the Defendant in respect of the settlement was accepted by the Defendants.

16. By the letter dated 2.4.2002 addressed by the Applicants to the Defendant, the Applicants referred to the one time settlement proposal submitted by the Defendant for full and final settlement of accounts of all the group companies. The Applicants stated that the same was approved subject to the terms and conditions mentioned therein. Paragraphs 1, 2 and 5 thereof read as under :

> "1. It is approved to buy Mulund Property consisting of the entire plot of land along with the two towers built thereon for Rs.112.89 crores being the average valuation by three different Govt. Registered valuers. Necessary title verification / clearance shall be obtained before registration in favour of the bank.
>
> 2. The purchase consideration of Rs.112.89 crores is to be appropriated

as under :

Name of the Account.	Total Amount	Amount to be appropriated	Balance
1. Triad Construction P Ltd.	35.00	35.00	Nil
2. Mrugank Investments Ltd.	35.00	27.39	7.61
3. Aviquipo of India Ltd.	15.00	15.00	Nil
4. Tirumala Impex Pvt. Ltd.	22.00	22.50	Nil
5. Repayment of ICDs to Agee Gold	13.00	13.00	--
TOTAL	**120.50**	**112.89**	**7.61**

The outstanding in the above four loan accounts were frozen towards full and final settlement.

3. .....

4. .....

5. Documentation is to be completed as suggested by the Bank's Solicitors and 90% of the sale proceeds are to be appropriated towards the settled dues pending execution / registration of Conveyance Deed in favour of the bank and the balance 10% on completion of the Conveyance Deed."

17. At the foot of the letter the Defendant and one Triad Constructions (P) Limited made the following endorsement :

> "We accept the above Terms/ and also Accept/Acknowledge that Bank is entitled to Adjust/Appropriate to the extent of Rs.13.00 CRORES out of the sale proceeds towards the liability of Agee Gold Refiners Ltd."

18. A public notice dated 5.4.2002 was issued by the Applicant's Advocates in respect of the said transaction. The Plaintiff's Advocates, by their letter dated 5.4.2002 placed their objection on record. The same was replied to by the Applicant's Advocate's letter dated 23.4.2002.

19. Ultimately, a conveyance dated 31.5.2002 was executed between the Applicants therein referred to as the purchasers, the Defendants and Triad Constructions (P) Limited in respect of the said property, including the land and buildings thereon. As on this date the entire consideration was paid/deemed to have been paid by adjustment.

20. It would be convenient firstly to deal with Mr.Purohit's contention on behalf of the Applicants that the Applicants were entitled to adjust the entire consideration in respect of the sale of the

said property in discharge of their dues in respect of all of which the Defendants had created a security over the said property.

21. If, in fact, all the dues of the Defendant were secured by the mortgage created over the said property, the matter would end there for admittedly, the dues of the Defendant are higher than the sale proceeds of the said property.

22. Mr.Shetye, the learned counsel appearing on behalf of the Plaintiffs submitted that the dues of Agee Gold settled in the sum of Rs.13 crores as stated in clause 2 of the letter dated 2.4.2002 extracted above were admittedly not secured by the mortgage deed. Thus, he submitted, there was a surplus in the sale proceeds which, according to him, could not be adjusted in respect of the dues of Agee Gold, the same not being covered by mortgage deed.

23. Mr.Purohit however submitted that the sale consideration of 112.89 crores is to be bifurcated between the value of the land and the value of the construction thereof. Relying upon the letter dated 27.2.2002 he stated that the parties had valued the

constructions on the land at Rs.84.46 crores. Thus, the value of the land was only Rs.28.43 crores. The dues of the Defendant, he submitted, were more than Rs.28.43 crores. Further, the construction on the land according to him, did not belong to the Defendants but to Triad. If these contentions on facts were correct, the Applicants would be entitled to succeed on this ground alone.

24. I am however unable to accept the Applicant's case regarding the ownership of Triad of the construction on the said land. The equitable mortgage was created on 2.8.1995. The same did not refer to any interest of Triad in the construction on the land. The reference to Triad's alleged right appeared for the first time only in the deed of mortgage dated 26.3.2002. Mr.Purohit was unable to show me a single document or circumstance which indicated the transfer of ownership or creation of a right of ownership in favour of Triad in respect of construction on the said land.

25. On the other hand, there is intrinsic evidence in the deed of conveyance dated 31.5.2002 to indicate the contrary. Clause 1 which provides for the sale of the said property, further recites :

> "towards adjustment / appropriation / repayment in full of the said Outstanding Amount and interest being an amount of Rs.87 Crores to Geekay (out of which Rs.25 Crores was payable by Geekay to Triad on account of refund of Security Deposit and Triad having authorised the Purchaser to adjust / appropriate the same towards their liabilities) and Rs.25.89 Crores to Triad towards cost of construction in the following manner :-"

26. If Triad was the owner of the towers constructed on the said land, it is difficult to understand why the Defendant paid the sum of Rs.25.89 Crores to Triad towards cost of construction thereof. The fact of payment of Rs.25.89 Crores by the Defendants to Triad, would indicate that the towers were also owned by the Defendants. Added to this, is the fact that there is nothing on record which even remotely refers to a sale by the Defendants to and/or the creation of any right by the Defendant in favour of Triad, in respect of the said towers.

27. Further, there is no indication of any consideration from Triad for the acquisition of any right in the construction. The security deposit referred to in clause 1 of the deed of conveyance

extracted above was paid by Triad to the Defendants in consideration of the Defendants permitting Triad to construct the said towers. The same is referred to in recital (iv) of the indenture of mortgage dated 26.3.2002. Thus, even the security deposit was repaid as recorded in clause 1 of the deed of conveyance. Thus, on record, there is no indication even of any consideration having been paid by Triad to the Defendants for acquiring any right, much less the right of ownership, in respect of the said towers.

28. Mr.Shetye's submission that the entire sale consideration belonged to the Defendant is therefore well founded. Further, for this reason, the dues of Agee Gold Refiners Ltd. settled at Rs.13 Crores were unsecured atleast till 2.4.2002 i.e. the date of the said letter.

29. However, to succeed in this Notice of Motion, the Plaintiffs would first have to succeed in establishing that they were entitled to succeed in Notice of Motion No.1095 of 2002 for the statement made on behalf of the Applicants, recorded in paragraph 3 of the order dated 2.5.2002 was that if the Plaintiffs ultimately succeeded in Notice of

Motion No.1095 of 2002 they may have their claim satisfied out of the said deposit of Rs.8,00,000/-. I have extracted earlier the prayer in Notice of Motion No.1095 of 2002.

30. The Plaintiffs were clearly not entitled to this relief. Admittedly, the Defendants had created an equitable mortgage and then executed the said indenture of mortgage dated 26.3.2002 in respect of the said property in favour of the Applicants for the repayment of their dues. Clause 8(c) of the indenture of mortgage, extracted above, expressly permitted the Defendants to sell the property and to appropriate the sale proceeds towards their claim.

31. At one stage, I did consider reading the order dated 2.5.2002 to include an injunction restraining the Defendants from dealing with the sale consideration in access of the secured dues of the Defendants. However, on further consideration, this would be unfair to the Applicants. It would amount to adding to the statement made by the Applicants before the Court. On principle, it would be unfair for the Court to read into a statement made on behalf of a party, something more than what the party itself desired to convey. Thus, I am of the

view that the Plaintiffs were not entitled to succeed in Notice of Motion No.1095 of 2002. They did not claim the appropriate relief viz. any restraint order in respect of the sale proceeds in excess of the dues of the Plaintiffs secured by the mortgage.

32. The Plaintiffs would not have been entitled to succeed in Notice of Motion No.1095 of 2002 for another reason.

33. The Applicant's offer regarding the settlement contained in the letter dated 2.4.2002 was accepted unconditionally by the Defendants and by Triad. The letter expressly permitted the dues of Agee Gold Refiners Ltd. at Rs.13 Crores, to be adjusted/appropriated towards the sale price upon the acceptance, which was also endorsed on 2.4.2002. An agreement for sale came into existence between the Defendants and the Applicants. The fact that a formal agreement for sale was thereafter executed, would make no difference. The letter dated 2.4.2002 contained all the essential terms and conditions necessary to constitute a valid and binding agreement for sale. It was not suggested that the formal agreement for sale executed thereafter on

2.5.2002 was in substitution of and/or different from the agreement contained in the letter dated 2.5.2002.

34. Thus, even assuming that the ad-interim order dated 19.4.2002 constituted an attachment in execution, the same would not prevail over the prior rights of the Applicants under the agreement dated 2.4.2002.

35. In *Vannarakkal Kallalathil Sreedharan v. Chandramaath Balakrishnan & Anr., (1990) 3 Supreme Court Cases, 291*, it was held as under :

> "**9.** In our opinion, the view taken by the High Courts of Madras, Bombay, Calcutta and Travancore-Cochin in the aforesaid cases appears to be reasonable and could be accepted as correct. The agreement for sale indeed creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Section 64 CPC no doubt was intended to protect the attaching creditor, but if the subsequent conveyance is in pursuance of an agreement for sale which was before the attachment, the contractual obligation arising therefrom must be allowed to prevail over the rights of the attaching creditor. The

> rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. We cannot, therefore, agree with the view taken by the Punjab and Haryana High Court in *Mohinder Singh case*."

36. Notice of Motion No.1095 of 2002 was allowed to be withdrawn by an order dated 30.6.2005. Thereafter, the Plaintiff took out Notice of Motion No.1957 of 2005. I will presume that the reliefs sought in the present Notice of Motion were in fact sought in Notice of Motion No.1057 of 2005. However, by this time the entire transaction between the Defendant and the Applicants stood concluded and worked out. Even the conveyance was executed on 31.5.2002 and registered on 1.6.2002. Admittedly, and as recorded in clause (ii) of the Deed of Conveyance thereupon the entire consideration stood adjusted.

37. Thus, by the time Notice of Motion No.1957 of 2005 was taken out the Applicants had paid the entire purchase price for the said property. There is and can be no challenge to the validity of the

sale.

38. In the circumstances, the Chamber Summons is dismissed.